Supreme Court, U.S.
FILED

94 396 AUG - 1 1994

OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

CASE NO. _____

RAYMOND WIZBOWSKI AND BARBARA WIZBOWSKI,

PETITIONERS,

v.

COMMISSIONER OF INTERNAL REVENUE,

RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI
FROM THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

APPENDIX

Anthony P. Capozzi, #068525
Janene R. Weber, #155021
Law Offices of Anthony P. Capozzi
1233 West Shaw Avenue, Suite 102
Fresno, California 93711
Telephone (209) 221-0200

Attorneys for Petitioners

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RAYMOND V. WIZBOWSKI; WIZBOWSKI,	)	No. 92-70365
	)	IRS NO. 13864-84
Petitioner-Appellants,	)	
v.	)	
	)	**MEMORANDUM**[1]
COMMISSIONER INTERNAL REVENUE SERVICE,	)	
Respondent-Appellee.	)	

Appeal from a Decision of the
United States Tax Court

Submitted November 1, 1993[2]
San Francisco, California

Before: **KOZINSKI** and **O'SCANNLAIN**, Circuit Judges; **KELLEHER**[3] District Judge.

---

[1]This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit R. 36-3.

[2]The panel unanimously finds this case suitable for submission on the record and briefs and without oral argument. Fed. R. App. P. 34(a), Ninth Circuit R. 34-4.

[3]The Honorable Robert J. Kelleher, Senior United States District Judge

Appellants Raymond and Barbara Wizbowski (the "Wizbowskis") seek to vacate a July 8, 1986 decision by the Tax Court assessing deficiencies against them for the 1977 and 1978 tax years (the "1986 Decision"). The Wizbowskis filed a motion for leave to file a motion to vacate this decision with the Tax Court. The Tax Court denied the Wizbowskis' motion. We have jurisdiction under 26 U.S.C. section 7482, and we affirm.

I

Decisions of the Tax Court become final within ninety days where no appeal is taken. 26 U.S.C. sections 7481, 7483. Because the Tax Court has limited jurisdiction and lacks general equitable powers, it lacks jurisdiction to vacate a final decision that it has made unless the decision was procured through a fraud upon the court or a mutual mistake. Abatti v. C.I.R., 859 F.2d 115, 117, 118 (9th Cir. 1988). The Wizbowskis allege that the 1986 Decision resulted from a fraud upon the court. We review de novo the Wizbowskis' claim. Id. at 117.

The Wizbowskis fail to demonstrate that the 1986 Decision was procured through a fraud upon the court. The "fraud on the court" doctrine is construed "narrowly, in the interests of preserving the finality of judgments" Toscano v. C.I.R., 441 F.2d 930, 934 (9th Cir. 1971). Fraud on the court "must involve an

---

for the Central District of California, sitting by designation.

unconscionable plan or scheme which is designed to improperly influence the court in its decision." Abatti, 859 F.2d at 118. A fraud upon a party generally is not a fraud upon the court. Anderson v. C.I.R., 693 F.2d 844, 846 (9th Cir. 1979).

II

The Wizbowskis' claim that their attorney represented them under a conflict of interest does not allege a fraud upon the court. In a case closely resembling the instant one, Kenner v. C.I.R., 387 F.2d 689 (7th Cir. 1968), taxpayers sought to vacate a final order of the Tax Court, claiming that their attorney had become chief counsel of the Internal Revenue Service ("IRS") after representing them before the Tax Court. The court rejected the taxpayers' appeal, holding that "even assuming impropriety in [the attorney's] conduct . . .[,] the facts alleged do not indicate that there was fraud on the tax court." Id. at 692. Similarly, in Anderson, plaintiffs alleged that they had been misled by their tax advisors in support of their motion to vacate a final Tax Court assessment of a deficiency. This court rejected their claim, holding that any deception by the advisors was "fraud practiced upon the taxpayers but not upon the Tax Court." 693 F.2d at 846.

The Wizbowskis claim that their attorney operated under a conflict of interest because he rejoined the IRS after he represented them before the Tax Court. The Wizbowskis do not controvert evidence produced by the appellee demonstrating that, at the time he represented the

Wizbowskis, their attorney had little expectation that he would return to work at the IRS and had not received an offer of employment or promise of future employment. Their claim thus is little more than pure speculation. Further, to the extent that there was any conflict of interest, this did not involve a plan or scheme to defraud the court. Any conflict at most would be a fraud upon only the Wizbowskis, not the court. Kenner, 387 F.2d at 689; Anderson, 693 F.2d at 846.

III

The Wizbowskis thus fail to demonstrate a fraud upon the court permitting the Tax Court to vacate the 1986 Decision. Having resolved the merits of the appeal against the Wizbowskis, it is unnecessary for the court to reach the question of whether the Wizbowskis' motion for leave to file was filed in a timely manner. The decision of the Tax Court is AFFIRMED.

FILED: November 29, 1993.

UNITED STATES TAX COURT
WASHINGTON, D.C. 20217

RAYMOND V. AND BARBARA WIZBOWSKI,	Docket No. 13864-84
Petitioners,	
v.	
COMMISSIONER OF INTERNAL REVENUE,	
Respondent.	

O R D E R

Decision in this case was entered July 8, 1986, pursuant to our opinion in Steinert, et al. v. Commissioner, T.C. Memo. 1985-581, filed November 27, 1985. Said decision became final 90 days thereafter, in accordance with sections 7481(a) and 7483, Internal Revenue Code.

On November 12, 1991, petitioners filed a Motion for Leave to File a Motion to Vacate this Court's Decision Pursuant to Rule 162 of the United States Tax Court. Said motion alleges that the attorney for petitioners committed a "fraud upon the court" within the meaning of Toscano v. Commissioner, 441 F.2d 930 (9th Cir. 1971). Respondent's Memorandum in Opposition to Petitioners' Motion for Leave to File a Motion to Vacate this Court's Decision Pursuant to Rule 162 of the United States Tax Court was filed January 22, 1992. Hearing on the motion was held on March 17, 1992, in Pasadena,

California. Petitioners' Memorandum Re Evidentiary Hearing was filed on April 21, 1992.

Petitioners presented evidence that their former attorney, T. Dean Hawkins (Hawkins), was employed by the Internal Revenue Service both before and after his representation of them in this case. According to the testimony, petitioners learned in 1987 or 1988 that, after Hawkins left his initial employment with the Internal Revenue Service, he retained an expectation that he would be reemployed by the Internal Revenue Service when an opening occurred in Modesto, California. There is no evidence, however, that Hawkins actually had an outstanding offer of employment from the Internal Revenue Service at the time he represented petitioners in this case, and the preponderance of the evidence negates such an outstanding offer. There is no evidence that Hawkins' expectations about future reemployment by the Internal Revenue Service affected his performance on behalf of petitioners in this case. There is no evidence that respondent's counsel in this case was aware of Hawkins' expectations or that respondent received any advantage in this case as a result of Hawkins' expectations.

The Court of Appeals for the Ninth Circuit has said that fraud on the Court may occur when the acts of a party prevent his adversary from fully and fairly presenting his case or defense. Abatti v. Commissioner, 859 F.2d 115, 118 (9th Cir. 1988), affg. 86 T.C. 1319 (1986). A lawyer's inadequate or improper repre-

sentation of his own client is not a fraud on the Court and does not justify setting aside a final decision. Chao v. Commissioner, 92 T.C. 1141, 1144 (1989). In Toscano v. Commissioner, supra, relied on by petitioners, the lawyer's conflict of interest inured in favor of one client and to the disadvantage of the other. There is no such evidence in this case.

Moreover, we do not believe that petitioners would be able to secure any different or other result in this case if our prior decision were vacated. It would be unfair to respondent, to the Court, and to other taxpayers to reopen this case at this time; and petitioners' delay in bringing their motion exacerbated those difficulties. See Chao v. Commissioner, supra at 1144-1145. The petition in this case was filed in 1984 and disputed petitioners' tax liabilities for 1977 and 1978. Even if evidence not presented at trial previously existed, it would be stale or nonexistent by now. In an analogous situation, if petitioners were seeking a new trial in a case where decision was not final, the Court would refuse to consider belatedly tendered evidence without a showing of due diligence. See, e.g., Boryan v. United States, 884 F.2d 767, 771 (4th Cir. 1989); and Pietanza v. Commissioner, T.C. Memo. 1990-524, affd. without published opinion 935 F.2d 1282 (3d Cir. 1991). See also Lewis v. Commissioner, 90 T.C. 1044, 1053 (1988); Law v. Commissioner, 84 T.C. 985, 990-993 (1985); and Manzoli v. Commissioner, T.C. Memo. 1989-94, affd. 904 F.2d 101 (1st Cir. 1990), with respect to belated attempts to raise new issues.

We are entitled to consider such prejudicial delay even where taxpayers have not had their day in court. See Montgomery v. Commissioner, 367 F.2d 917 (9th Cir. 1966); Lewis v. Commissioner, supra at 1051; Brooks v. Commissioner, 82 T.C. 413, 429-430 (1984), affd. without published opinion 772 F.2d 910 (9th Cir. 1985); and Koufman v. Commissioner, 69 T.C. 473, 476-477 (1977). In this case, petitioners actually testified during the prior trial, and material facts concerning their case were known to them if not to Hawkins. We are persuaded that they had their day in Court.

Upon due consideration and for reasons more fully set forth in the transcript of proceedings of March 17, 1992, it is hereby

ORDERED: That petitioner' Motion for Leave to File a Motion to Vacate this Court's Decision Pursuant to Rule 162 of the United States Tax Court, filed November 12, 1991, is denied.

(Signed) /s/ Mary Ann Cohen
Mary Ann Cohen, Judge

Dated: Washington, D.C., April 24, 1992.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RAYMOND V. WIZBOWSKI; BARBARA WIZBOWSKI,	)	No. 92-70365
	)	IRS NO. 13864-84
Petitioners-Appellants,	)	
v.	)	
	)	**ORDER**
COMMISSIONER INTERNAL REVENUE SERVICE,	)	
Respondent-Appellee.	)	

Before: **KOZINSKI** and **O'SCANNLAIN**, Circuit Judges; **KELLEHER**[1] District Judge.

Appellant's petition for rehearing is DENIED.

FILED: May 3, 1994.

[1]The Honorable Robert J. Kelleher, Senior United States District Judge for the Central District of California, sitting by designation.

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RAYMOND V. and BARBARA WIZBOWSKI,	Case No. 92-70365
Plaintiffs,	Tax Court No. 13864-84
v.	
COMMISSION OF INTERNAL REVENUE,	
Defendant.	

PETITION FOR REHEARING

RE MEMORANDUM FILED NOVEMBER 29, 1993,
RE FROM APPEAL FROM A DECISION OF
THE UNITED STATES TAX COURT

Anthony P. Capozzi, #068525
Janene R. Weber, #155021
LAW OFFICES OF ANTHONY P. CAPOZZI
1233 West Shaw Avenue, Suite 102
Fresno, California 93711
Telephone: (209) 221-0200
Facsimile: (209) 221-7997

Attorneys for Petitioners-Appellants
Raymond V. and Barbara Wizbowski

I.

INTRODUCTION

Appellant Raymond V. and Barbara Wizbowski ("Appellants") respectfully petition this Honorable Court for a rehearing of the appeal in the above-entitled cause pursuant to Federal Rules of Appellate Procedure, Rule 40.

The present petition is addressed solely to material points of fact and law which Appellants believe the court overlooked in issuing it's judgment of November 29, 1993, which affirmed the decision of the Tax Court. (See Ex. 1 attached hereto.)

Therefore this petition is devoted to convincing this court that it has erred in its determination of whether or not the appellant's representation by attorneys Hawkins and Harris in the Tax Court proceedings, constitute "fraud on the court" sufficient to vacate the Tax Court decision entered on July 8, 1986.

II.

ARGUMENT

A. THE COURT OVERLOOKED THE FACTS OF ATTORNEY MISCONDUCT BY HAWKINS AND HARRIS WHEN IT RULED THAT FRAUD ON THE TAX COURT WAS NOT PRESENT IN THE PROCEEDING BELOW

Section II, pages 2 and 3 of the printed opinion of this court states that

the Wizbowskis' claim of a conflict of interest by their attorney "Hawkins," because he rejoined the IRS after he represented them before the Tax Court, does not constitute a fraud on the court which would justify setting aside the judgment of the Tax Court.

Appellants' argument that fraud on the court existed in the Tax Court proceedings was not premised solely upon the claim that their attorney Hawkins possessed a conflict of interest. Appellants also argued that attorney misconduct, by both Hawkins and Harris, consisting of breaches of duty, violations of ethical rules, and nondisclosures by attorneys Hawkins and Harris constitute a fraud on the court as defined in Alexander v. Robinson, 882 F.2d 421, (9th Cir. 1989).

The material fact thus overlooked by this court in it's judgment dated November 29, 1993, is that a finding of fraud on the court is presented by Hawkins and Harris' breach of fiduciary duties, violations of ethical rules, and non-disclosures. Only Hawkins' conflict of interest in I.R.S. employment subsequent to his representation of the Appellants in the Tax Court proceedings was considered by this court in determining whether "fraud on the court" existed. By overlooking the material fact of attorney misconduct by both Harris and Hawkins, this court did not consider whether the facts presented by Appellants Tax Court representation constitutes "fraud on the court" under the principles of Alexander v. Robinson, supra.

B. BY FOCUSING ONLY ON HAWKINS CONFLICT OF INTEREST, THIS COURT OVERLOOKED THE APPLICATION OF THE NINTH CIRCUIT OPINION OF ALEXANDER v. ROBINSON

Appellants argued that a fraud on the court occurred not only through Hawkins conflict of interest, but also through attorney misconduct of both Hawkins and Harris during the course of Appellants Tax Court representation. This fact was not considered by this court in it's judgment affirming the decision of the Tax Court.

This court concludes on page 3 of it's opinion that Hawkins' representation of Appellants under a conflict of interest does not constitute a fraud upon the court under Kenner v. C.I.R., 387 F.2d 689 (7th Cir. 1968) and Anderson v. C.I.R., 693 F.2d 844 (9th Cir. 1979). The application of attorney misconduct as constituting fraud on the court under Alexander v. Robinson, 882 F.2d 421 (9th Cir. 1989) is not addressed by the court.

//

//

//

//

//

//

//

III.

CONCLUSION

For the foregoing reasons, this petition for rehearing should be granted.

Dated: December 13, 1993.

LAW OFFICES OF ANTHONY P. CAPOZZI

By: _____
Janene R. Weber
Attorneys for Plaintiffs
Raymond and Barbara Wizbowski

FILED: December 15, 1993.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RAYMOND V. WIZBOWSKI; WIZBOWSKI,	)	No. 92-70365
	)	IRS NO. 13864-84
Petitioner-Appellants,	)	
v.	)	
	)	**MEMORANDUM**[1]
COMMISSIONER INTERNAL REVENUE SERVICE,	)	(EXHIBIT 1 TO PETITION FOR REHEARING)
Respondent-Appellee.	)	

Appeal from a Decision of the
United States Tax Court

Submitted November 1, 1993[2]
San Francisco, California

Before: **KOZINSKI** and **O'SCANNLAIN**, Circuit Judges; **KELLEHER**[3] District Judge.

---

[1]This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit R. 36-3.

[2]The panel unanimously finds this case suitable for submission on the record and briefs and without oral argument. Fed. R. App. P. 34(a), Ninth Circuit R. 34-4.

[3]The Honorable Robert J. Kelleher, Senior United States District Judge

Appellants Raymond and Barbara Wizbowski (the "Wizbowskis") seek to vacate a July 8, 1986 decision by the Tax Court assessing deficiencies against them for the 1977 and 1978 tax years (the "1986 Decision"). The Wizbowskis filed a motion for leave to file a motion to vacate this decision with the Tax Court. The Tax Court denied the Wizbowskis' motion. We have jurisdiction under 26 U.S.C. section 7482, and we affirm.

I

Decisions of the Tax Court become final within ninety days where no appeal is taken. 26 U.S.C. sections 7481, 7483. Because the Tax Court has limited jurisdiction and lacks general equitable powers, it lacks jurisdiction to vacate a final decision that it has made unless the decision was procured through a fraud upon the court or a mutual mistake. Abatti v. C.I.R., 859 F.2d 115, 117, 118 (9th Cir. 1988). The Wizbowskis allege that the 1986 Decision resulted from a fraud upon the court. We review de novo the Wizbowskis' claim. Id. at 117.

The Wizbowskis fail to demonstrate that the 1986 Decision was procured through a fraud upon the court. The "fraud on the court" doctrine is construed "narrowly, in the interests of preserving the finality of judgments" Toscano v. C.I.R., 441 F.2d 930, 934 (9th Cir. 1971). Fraud on the court "must involve an

---

for the Central District of California, sitting by designation.

unconscionable plan or scheme which is designed to improperly influence the court in its decision." Abatti, 859 F.2d at 118. A fraud upon a party generally is not a fraud upon the court. Anderson v. C.I.R., 693 F.2d 844, 846 (9th Cir. 1979).

II

The Wizbowskis' claim that their attorney represented them under a conflict of interest does not allege a fraud upon the court. In a case closely resembling the instant one, Kenner v. C.I.R., 387 F.2d 689 (7th Cir. 1968), taxpayers sought to vacate a final order of the Tax Court, claiming that their attorney had become chief counsel of the Internal Revenue Service ("IRS") after representing them before the Tax Court. The court rejected the taxpayers' appeal, holding that "even assuming impropriety in [the attorney's] conduct . . .[,] the facts alleged do not indicate that there was fraud on the tax court." Id. at 692. Similarly, in Anderson, plaintiffs alleged that they had been misled by their tax advisors in support of their motion to vacate a final Tax Court assessment of a deficiency. This court rejected their claim, holding that any deception by the advisors was "fraud practiced upon the taxpayers but not upon the Tax Court." 693 F.2d at 846.

The Wizbowskis claim that their attorney operated under a conflict of interest because he rejoined the IRS after he represented them before the Tax Court. The Wizbowskis do not controvert evidence produced by the appellee demonstrating that, at the time he represented the

Wizbowskis, their attorney had little expectation that he would return to work at the IRS and had not received an offer of employment or promise of future employment. Their claim thus is little more than pure speculation. Further, to the extent that there was any conflict of interest, this did not involve a plan or scheme to defraud the court. Any conflict at most would be a fraud upon only the Wizbowskis, not the court. Kenner, 387 F.2d at 689; Anderson, 693 F.2d at 846.

III

The Wizbowskis thus fail to demonstrate a fraud upon the court permitting the Tax Court to vacate the 1986 Decision. Having resolved the merits of the appeal against the Wizbowskis, it is unnecessary for the court to reach the question of whether the Wizbowskis' motion for leave to file was filed in a timely manner. The decision of the Tax Court is AFFIRMED.

FILED: November 29, 1993.